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In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 § U.S.C. 641) or wire fraud (18 U.S.C. § 1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom or practice.

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PETITION FOR A WRIT OF CERTIORARI

Thomas D. McAusland and Christopher M. Pafort petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The judgment of the court of appeals was initially reported at 972 F.2d 343 (Table). Thereafter, the court ordered that its opinion be published (App., *infra*, 16a, 18a). The opinion (App., *infra*, 1a-15a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1992. A timely petition for rehearing was denied on October 1, 1992 (App., *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTES

The federal statutes regarding theft of government property (18 U.S.C. § 641), wire fraud (18 U.S.C. § 1343), and conspiracy to defraud the United States (18 U.S.C. § 371) are reprinted in the Appendix (App., *infra*, 25a-26a).

STATEMENT

This case raises fundamental issues regarding the imposition of criminal liability for receipt of government information. Petitioners were charged, tried, and convicted on a theory that (1) government information is government "property" under the pertinent statutes, and (2) conviction may be had even though no statute or published regulation prohibited dissemination of the information in question. The case thus presents far-reaching questions regarding the nature of the government's property interest in information in its possession and the reach of federal criminal statutes in protecting such interests. The issues are of recurring importance, practical as well as theoretical, and have spawned conflicting decisions in the lower courts.

Petitioners Thomas McAusland and Christopher Pafort, former marketing executives of Litton Data Systems, Inc. ("Litton"), were convicted of theft of government property (18 U.S.C. § 641), wire fraud (18 U.S.C. § 1343), and conspiracy to defraud the United States (18 U.S.C. § 371). The sole basis for the charges was their receipt of, and efforts to receive, unclassified government information. The theory of the government's case on all counts against petitioners was that they obtained government property without authority. The only government "property" at issue was what the government termed "procurement sensitive information."[1] There was no allegation that petitioners ever employed any

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[1] C.A. App. 22-23, 35-36 (Indictment).

illegal means (such as larceny, bribery, or threats) to obtain the information. Rather, they hired a consultant, who in turn utilized his contacts within the relevant procurement officialdom to obtain data regarding the status of Litton's bids in certain procurements.

The question in this prosecution is not the ethics or desirability of this practice -- a matter debated in the Congress after the events at issue here (see pp. 26-28, *infra*) -- but whether such conduct falls within the reach of general criminal laws prohibiting the obtaining of government property by theft or fraud. Under the theory of the prosecution, which the courts below accepted, conviction may rest on the defendant's knowing receipt of information disclosed in violation of nothing more than government "custom and practice" or purely internal administrative directives.

1. This case involves petitioners' efforts to obtain procurement information during the period from early 1987 to early 1988. The responsibilities of both men at that time included keeping Litton fully advised of developments in prospective and pending procurements. C.A. App. 405-406, 454-471, 514-522. To that end, petitioners communicated with Thomas Muldoon, a private consultant retained by Litton to identify new business opportunities and to develop information on ongoing procurements. C.A. App. 234-237.

Petitioners received unclassified information from Muldoon concerning three procurements: (1) the Advanced Tactical Air Command Central (ATACC), a procurement for a radar command and control system conducted by the Space and Naval Warfare Systems Command (SPAWAR); (2) UYQ-21, a procurement for a second supplier of a radar display system conducted by Naval Sea Systems Command (NAVSEA); and (3) FOCS, a procurement to obtain a source for a Marine Corps fiber optic communications system.

Petitioners were aware -- indeed, fully expected -- that Muldoon would occasionally obtain unclassified information from government officials working on these procurements. See C.A. App. 240-244. It has never been suggested, however, that petitioners expected Muldoon to use illicit inducements or other unlawful means to procure the information (or that Muldoon did so). Rather, petitioners expected that Muldoon would use his knowledge and contacts to obtain certain types of procurement information from whoever would agree to release it.

2. Petitioners were charged in a six-count indictment with receiving or seeking to receive unclassified government information relating to the ATACC, UYQ-21, and FOCS procurements. Count 1 charged a conspiracy (alternatively) to defraud the United States or to commit the object theft and fraud offenses specified in the substantive counts (18 U.S.C. § 371); Count 2 charged the offense of theft of government property (*id.* § 641); and Counts 3-6 charged wire fraud offenses (*id.* § 1343).

The theory that connects the six counts is that petitioners, through Muldoon, obtained the disclosure of "certain information in the possession of the government" that was "[p]rocurement sensitive information" and that "was not to be disclosed to individuals and companies outside the government." C.A. App. 19, ¶ 6. According to the indictment (*ibid.*),

> [p]rocurement sensitive information included the "numbers" submitted in the initial proposals, the contents of the initial technical proposals, the source selection plans, and the percentage figures that government personnel used when weighing the scores for different evaluation criteria. In addition, before the evaluations of the initial proposals were completed, no information was to be released about

> the results of the evaluations or the rankings of the proposals by the evaluators.

The indictment cited no authority for this definition of "procurement sensitive information" or for the proposition that such material "was not to be disclosed."

The core transaction charged in the indictment is Muldoon's receipt and transfer to petitioners of information that Litton's ATACC proposal had been deemed unacceptable. The indictment alleges that Muldoon furnished this information to petitioners on October 1, 1987, some five months before the government formally advised unsuccessful offerors of the unacceptability of their proposals. Muldoon is alleged to have obtained the results of the preliminary evaluation of the ATACC proposals, including the unacceptability of Litton's proposal, from another private consultant, Mark Saunders, who in turned received this information from George Stone, the SPAWAR official responsible for conducting the ATACC procurement. C.A. App. 30-32, ¶¶ 24-28. This transfer of information is the sole basis of the charge in Count 2 that petitioners aided and abetted "others to knowingly convert * * * and without authority convey and dispose of a thing of value of the United States" (C.A. App. 35); the sole basis of numerous overt acts alleged in connection with the conspiracy and scheme charged in Counts 1 and 3 through 6 (C.A. App. 30-32, ¶¶ 24-28; C.A. App. 36, ¶ 2); and the sole basis of the two telephone calls charged as wire communications in Counts 4 and 5 (C.A. App. 37).

3. As the case proceeded, the prosecution's theory on all counts was that petitioners broke the law by receiving or seeking to receive "procurement sensitive information" that they knew government officials were "without authority" to disclose. See C.A. App. 69-70, 74, 77-79, 82, 83-84. Petitioners unsuccessfully objected that, if information was

property at all under the relevant statutes, the government was obligated to prove that dissemination of the information was prohibited by published regulation or statute.

a. Petitioners moved to dismiss the indictment. They argued that, in order to impose criminal liability for obtaining government information, the prosecution had to demonstrate that release of the information specified in the indictment was clearly prohibited by published rules or regulations; that the indictment did not rest on such a prohibition; and that the prosecution was unable to establish such a prohibition. The prosecution responded that it needed to show only that release of this information was contrary to internal government practices or policies of which petitioners had knowledge. The prosecution maintained that it could rely, among other things, on government "custom and practice."[2]

The district court denied the motion to dismiss. It first held that, under circuit precedent, information "is a species of property and a thing of value under [18 U.S.C. §] 641." App., *infra*, 20a. The court went on to rule, as the government contended, that in addition to other possible grounds, a government "custom and practice" of nondisclosure could be a permissible basis for liability. *Id.* at 21a-22a.

b. The prosecution's theory dominated its proof at trial. Thus, although both the prosecution and the defense introduced various of the then-existing federal regulations into evidence,[3] the government relied extensively on the testimony

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[2] Tr. 5/9/91, 39, 40-41, 43; see also Gov't Opp. To Motion To Dismiss, 6-7.

[3] The government claimed that, with respect to some (but not all) of the information at issue, dissemination of the information was in

(continued...)

of government procurement officials regarding internal practices and policies that purportedly prohibited release of the "procurement sensitive information."[4] The prosecution also introduced internal government directives to this effect.[5] Without abandoning their legal position that lack of authority could be proven only with reference to clear, *published* regulations or statutes, petitioners also vigorously contested the prosecution's proof on its own terms. See Pet. C.A. Br. 16 n.4.

Likewise, the prosecution's theory vitally shaped its proof that petitioners knew that release of the information specified in the indictment would be unauthorized. The prosecution sought to establish *scienter* in part through opinion witnesses who testified that procurement industry executives in petitioners' positions would have been aware of the government's internal disclosure practices.[6] On this point, too, petitioners vigorously disputed the government's proof. See Pet. C.A. Br. 17 & n.5.

The prosecution's theory -- that a prohibition on dissemination of information in published regulations or statutes is unnecessary -- also figured prominently in the

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[3] (...continued)
fact prohibited by published regulations. Petitioners disputed this contention, but the point is of little moment here. The government adamantly insisted that no such prohibition was necessary, and the jury was never required to find that petitioners had knowledge that the disclosures they obtained violated any published restriction on dissemination. See page 8, *infra*.

[4] *E.g.*, C.A. App. 349-351, 356-365, 397-398, 443-445, 496-497.

[5] *E.g.*, C.A. App. 247, 252-253.

[6] *E.g.*, C.A. App. 410-417, 502-507.

presentation of the core transaction charged in the indictment (Muldoon's receipt and conveyance of the information that Litton's ATACC proposal had been deemed unacceptable). The procurement officials assigned to perform the preliminary technical evaluation of the ATACC proposals had determined that Litton's proposal was technically unacceptable by early September 1987, *before* this information was conveyed by Stone to Saunders (and thereafter by Saunders to Muldoon).[7] Pointing to regulations establishing a contractor's right to be informed immediately of such a determination, petitioners contended that they could not be convicted on the basis of their receipt of this information. Prosecution witnesses, however, testified that, regardless of the published regulations, an internal government practice prohibited disclosure of the unacceptability determination prior to the filing of a "business clearance" by the source selection authority.[8] The district court held that the jury could consider this "background of custom and practice" in evaluating this critical transfer of information. C.A. App. 178.

c. The prosecution's theory governed the jury instructions. The court rejected petitioners' requests that the jury be instructed that the prosecution was required to "show that a particular federal statute, rule or regulation prohibited the release of the information" (C.A. App. 169), and that the jury should acquit if it entertained reasonable doubt that petitioners "knew that the information * * * was released without authority in violation of [federal] regulations" (C.A. App. 167).

d. The jury convicted petitioners on all six counts. Petitioners filed post-trial motions for acquittal. They renewed their argument that the statutes did not permit

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[7] *E.g.*, C.A. App. 216, 374, 387-388, 392-393, 489-490.

[8] *E.g.*, C.A. App. 420-421, 424-425, 442, 511.

conviction in the absence of a published prohibition on dissemination, and that, if they were construed as broadly as the prosecution urged, the statutes would violate due process.

Although ruling for the prosecution, the district court expressed serious doubts about its theory. The court found it "painfully obvious" that this was "a troublesome area * * * because it's a novel area. No case is directly in point. No case is itself entirely nourishing." App., *infra*, 23a. The court emphasized that "[i]t's a very close question in the Court's mind on the due process issue." *Ibid.* Noting that "it will not surprise the Court if [petitioners'] argument ultimately is vindicated on appeal," the court nevertheless denied the motion for acquittal. *Id.* at 24a.

e. The only point at which the district court credited petitioners' arguments on the lack of clear, precise, and public regulations restricting disclosure was in connection with sentencing. The court found that the offenses of which petitioners were convicted had been "committed under an unclear regulatory regime that was later clarified" by legislation (discussed at pp. 26-28, *infra*). C.A. App. 63, 65. On this basis, the court granted petitioners' motions to depart downward in their respective sentences under the Guidelines. The court sentenced each petitioner to concurrent 12-month terms of imprisonment on each count of the indictment. C.A. App. 40, 44.

4. The court of appeals affirmed. With respect to the threshold issue whether Section 641 encompasses government information, the court relied on circuit precedent broadly construing "thing of value" to include government information. App., *infra*, 9a n.2.

The court of appeals also squarely rejected petitioners' contention that criminal liability could be imposed "only if disclosure of the information was clearly prohibited by published [laws or regulations]." App., *infra*, 10a. The

court acknowledged that prior decisions, including a leading Second Circuit case, had characterized an agency's rules and regulations "'as both a delimitation and a clarification of the conduct proscribed' under Section 641." *Id.* at 11a. It held, however, that "the existence of a published regulation proscribing disclosure" was unnecessary. *Ibid.* A regulation was not "the exclusive method of preventing vagueness"; the "'government's longstanding practice'" of nondisclosure could be sufficient for criminal liability. *Ibid.* Because of its resolution of this legal issue, the court rejected petitioners' related challenge to the jury instructions. *Id.* at 14a.[9]

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance -- the appropriate standard for criminal liability, under general federal theft and fraud statutes, for a private citizen's receipt of government information. While there are cases applying these statutes to disclosure of certain types of information, the ruling below represents the first appellate decision to broaden these prohibitions to impose liability for receipt of government information in the absence of any statute or regulation clearly prohibiting unauthorized dissemination of the information in question. "[T]here is no more important question about the extent to which the courts will fashion secrecy policy with Congress in the wings than whether or not [general criminal statutes] will be construed to reach an employee's unauthorized transfer of government information, or copies of government documents."[10] It is an issue, more-

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[9] The court also rejected petitioners' challenges based on midtrial publicity and the admissibility of evidence of prosecution witnesses' plea bargains. App., *infra*, 14a-15a. They are not renewed here.

[10] Harold Edgar & Benno Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 402 (1986).

over, on which lower courts have reached sharply divergent results and on which this Court's review is necessary to establish uniformity.

Obviously, the notion that a private citizen can be prosecuted for "theft" of government information -- prosecuted, that is, *not* for receiving tangible government documents or records removed without authority from the government's possession, but rather for receiving mere *facts* about government information *disclosed* without authority -- must be implemented "with extreme care." *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 924 (4th Cir. 1980) (separate opinion of Winter, J.). "The free exchange of ideas, *especially* ideas in possession of the government, is at the very heart of our first amendment guarantees." *United States* v. *Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979) (emphasis added). This principle holds true not only in the political realm but also in the economic realm, where the vigorous pursuit and exchange of commercial information are recognized as "indispensable" to the operation of a "free enterprise economy." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). The court of appeals' decision tramples on these sensitive values.

The court of appeals' resolution of the government information issue is fundamentally flawed in two respects. First, as a threshold matter, government information simply is not government property under the pertinent statutes. Second, even if the statutes are broad enough to reach some forms of government information, criminal liability may not be imposed in the absence of some specific and public statute or regulation explicitly prohibiting disclosure of such information. These are issues that have importance transcending the specific context of government procurement, and respecting which the interpretation of the court below is both unsound and inconsistent with decisions of other courts.

A. Government Information Is Not Government Property Under The Theft-Of-Government-Property And Wire Fraud Statutes

Government information is fundamentally different from tangible government property. Dominion and use of tangible government property (such as a typewriter, a chair, or a vehicle) are necessarily limited and exclusive; in contrast, there is no comparable limitation on the number of persons who can simultaneously share use of government information. Access to information about the operations of the government, moreover, ranks among the highest values of a free society. Petitioners readily acknowledge that categories of government information may be removed from the public domain; but congressional intent to characterize government information as exclusive government property -- for which access and use are extremely limited -- should not be lightly presumed. With respect to the theft and wire fraud statutes (18 U.S.C. §§ 641 & 1343), government information is not government property.

1. Section 641 prohibits the embezzlement, theft, or conversion (or unauthorized sale, conveyance, or disposal) of "any record, voucher, money, or thing of value of the United States." The "thing of value" that petitioners were charged with converting was "procurement sensitive information." C.A. App. 35 (Indictment, Count 2). The courts of appeals are squarely split on the question whether government information may be considered a "thing of value" within the reach of the statute. The Ninth Circuit has long held -- and recently reaffirmed -- that "section 641 should not be read to apply to intangible goods." *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir.), cert. denied, 485 U.S. 991 (1988); see also *Chappell* v. *United States*, 270 F.2d 274, 276 (9th Cir. 1959). In the context of government information, three

Circuits have explicitly reached the opposite conclusion.[11] One Circuit has explicitly reserved the issue.[12] And at least one district court in still another Circuit has agreed with the Ninth Circuit and refused to permit the government to proceed on the theory that government information is a "thing of value" within the scope of 18 U.S.C. § 641.[13] Finally, individual court of appeals judges have concluded that 18 U.S.C. § 641 should not be applied to certain categories of information.[14]

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[11] See *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Jeter*, 775 F.2d 670, 680 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991). Both *Jeter* and *Fowler* explicitly reject the Ninth Circuit's interpretation. *Jeter*, 775 F.2d at 680; *Fowler*, 932 F.2d at 309-310. In this case, the court of appeals relied on its *Fowler* precedent. App., *infra*, 9a n.2.

Two other Circuits have disagreed with the Ninth Circuit's ruling in the context of a different intangible (appropriation of government services). See *United States* v. *Croft*, 750 F.2d 1354, 1359-1362 (7th Cir. 1984); *United States* v. *May*, 625 F.2d 186, 190-192 (8th Cir. 1980).

[12] See *United States* v. *DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976), cert. denied *sub nom. Lupo* v. *United States*, 429 U.S. 1038 (1977).

[13] See *United States* v. *Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979) (discussing *Chappell* and concluding that "the government will not be permitted to rely on any alleged conversion of government information for a violation of section 641 in this case").

[14] See *Truong*, 629 F.2d at 926 (separate opinion of Winter, J.) (Section 641 does not apply to classified information); *United States*

(continued...)

We respectfully submit that the better view of Section 641 is that one who induces even an unauthorized disclosure of government information has not "conver[ted]" a "thing of value of the United States." The statutory language is at best ambiguous as to whether information is the kind of "thing" with which the prohibition is concerned, and it is clear that the legislative intent reveals no purpose to reach that far.[15] Indeed, the common law tort of "conversion" applied only to tangible property.[16] Particularly because this Court has made clear that the enactment of Section 641 "was not intended to create new crimes but to recodify those then in existence" (*Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952)), there is no reason to conclude that Section 641 represented a dramatic expansion of criminal liability to include a crime of "converting" government information. Indeed, in construing an analogous statute regarding the interstate transportation of stolen and "converted" goods, this Court refused to accept an expansion of the statute to cover intangibles such as an unauthorized recording; instead, the

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[14] (...continued)
v. *Jeter*, 775 F.2d at 683 (Merritt, J., dissenting) (Section 641 does not apply to grand jury information).

[15] See, *e.g.*, Benjamin DuVal, *The Occasions of Secrecy*, 47 U. Pitt. L. Rev. 579, 596 n.42 (1986) ("[N]o one contends that it occurred to Congress that it was restricting the dissemination of information when it enacted [18 U.S.C. 641]."); *Truong*, 629 F.2d at 926 (separate opinion of Winter, J.) ("Congress was never consciously aware that § 641 would punish the unauthorized disclosure of government information and * * * this use of § 641 is a relatively recent innovation.").

[16] See *Chappell*, 270 F.2d at 277 (reviewing common law history). See also *Pearson* v. *Dodd*, 410 F.2d 701 (D.C. Cir.) (unauthorized reproduction of information is not common law conversion), cert. denied, 395 U.S. 947 (1969).

Court held that the statute requires "some prior physical taking of the subject goods." *Dowling* v. *United States*, 473 U.S. 207, 216 (1985).

Fundamental principles of statutory construction likewise weigh against the expansion of Section 641 to embrace government information. The rule of lenity requires adopting the narrower of two plausible constructions of a criminal statute,[17] and a conclusion that a "thing of value" does not include government information is, at the very least, a plausible construction of the statute. In addition, interpreting the statute to embrace government information would give rise to difficult constitutional questions because it would place extremely broad discretion in the hands of government officials to punish undesired dissemination of such information.[18]

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[17] See, *e.g.*, *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988) ("adher[ing] to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity"); *Liparota* v. *United States*, 471 U.S. 419, 429 (1985); *Williams* v. *United States*, 458 U.S. 279, 290 (1982).

[18] See generally *United States* v. *Tobias*, 836 F.2d at 451 (Ninth Circuit's interpretation "avoid[s] the first amendment problems which might be caused by applying the terms of section 641 to intangible goods"); *United States* v. *Hubbard*, 474 F. Supp. at 79 ("[i]f section 641 reaches the theft of government information, * * * serious first amendment questions would be raised, and there is ample legal authority to avoid those constitutional questions by interpreting the statute to not include information as a thing of value"). See also Melville Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 322 (1974) ("[t]he right to disseminate information regarding the activities of the federal government lies at the

(continued...)

Acceptance of the foregoing argument does not, of course, in any way constrict the power of Congress to employ the criminal sanction to help protect the secrecy of information in the government's possession. Thus, the statutes specifically criminalizing unauthorized disclosure of such information as tax returns or information obtained through electronic surveillance (18 U.S.C. § 2511(1)(c), 26 U.S.C. § 7213) -- or the recently enacted Procurement Integrity Act (41 U.S.C. § 423, see pp. 26-28, *infra*) -- are undiminished in scope or efficacy by the common sense reading of Section 641 that we advocate. All that we ask -- and the least this Court should insist upon -- is the enactment of criminal prohibitions clearly worded and actually intended to bring the criminal sanction to bear to preserve the secrecy of specific identifiable types of information.

2. The wire fraud counts similarly charged petitioners with a scheme to defraud the United States of a "property" interest by depriving it of its "control over, and exclusive use of, procurement sensitive information." C.A. App. 36-37; Tr. 1885-1886. The same reasons why dissemination of government information is not conversion of a "thing of value" under Section 641 dictate the conclusion that dissemination of government information is not a scheme to defraud the government of "property" under Section 1343. Nothing in the statutory language or legislative intent suggests a legislative design to embrace government information as property; the rule of lenity requires adoption of the narrower construction; and exclusion of government information from

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[18] (...continued)
very core of the freedoms of speech and press protected by the first amendment").

the scope of the statute avoids difficult constitutional problems.[19]

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[19] In *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987), this Court held that a private party's "confidential business information" is "property" within the scope of the wire fraud statute. "Confidential business information" generated by a private entity, however, carries a strong presumption of exclusivity; such a presumption is entirely inapplicable to government information, which is presumptively non-secret and the regulation of which may raise significant constitutional issues. See note 18, *supra*. See also, *e.g.*, *United States* v. *Kato*, 878 F.2d 267, 268-269 (9th Cir. 1989) (government interest in accurate information is not property interest under mail fraud statute); *United States* v. *Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988) (government interest in receiving information is not property interest under mail and wire fraud statutes); *United States* v. *Conover*, 845 F.2d 266, 271 (11th Cir. 1988) (information is not property under mail fraud statute in the absence of evidence that it is "confidential business information"). But see, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 366-367 (D.C. Cir.) (government information is government property under mail fraud statute), cert. denied, 488 U.S. 821 (1988).

If petitioners' convictions for theft and wire fraud are set aside, their conspiracy convictions under 18 U.S.C. § 371 must also be set aside. The conspiracy charge rested, as one alternative, on a conspiracy to violate the theft and wire fraud statutes (C.A. J.A. 22); a legal inadequacy in either of those substantive charges thus would require a conclusion that the conspiracy convictions also could not stand. See *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957). Furthermore, attempts to obtain information, dissemination of which is not prohibited by statute or regulation, cannot properly be found to be a conspiracy to defraud the United States. See note 30, *infra*.

B. Receipt Of Government Information Is Not Criminal In The Absence Of A Statute Or Regulation Prohibiting Dissemination Of The Information

If, notwithstanding the considerations discussed above, government information can sometimes qualify as government property capable of being stolen or taken by fraud under the pertinent statutes, vitally important questions arise as to the nature of protectible property interests under those statutes. Needless to say, not all information in the possession of the government comes within the covered category; there must be some appropriate and adequate assertion of a confidentiality interest in the information. Petitioners' position has been and is that the theft and fraud statutes could at most apply to the disclosure of information in contravention of clear, *public* regulations or statutes. Such an interpretation protects private citizens from being unfairly surprised by criminal prosecution and stops individual government officials from "creat[ing] an 'Official Secrets Act' through relentless expansion of general legislation that was obviously not enacted for speech restricting purposes."[20] At the same time, this construction accommodates the government's legitimate interest in safeguarding information where it is appropriate to do so, by establishing the confidential status of the information through the public law-making process.

As on the threshold issue, the lower courts are divided on this vitally important issue, and this Court's review is essential to resolve uncertainty and confusion.

1. Section 641 prohibits the conversion, conveyance, and disposal, "without authority," of "a thing of value of the

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[20] Edgar & Schmidt, 21 Harv. C.R.-C.L. L. Rev. at 405.

United States."[21] The statutory requirements of "without authority" and "thing of value" are thus central to Section 641's applicability to dissemination of government information. Rigorous construction of these statutory terms requires that, in order for the prohibition to apply to government information, the government must manifest its proprietary, exclusionary interest in such information through published statutes or regulations. This interpretation is essential to give concrete, objective meaning to the statutory requirements of authority and property in the context of government information. The alternative view, adopted here by the court of appeals, creates extremely amorphous liability for receipt of government information, under which the "without authority" and "thing of value" elements have no clear, consistent, and ascertainable meaning.[22]

The ruling below greatly expands criminal liability because it holds that criminal sanctions may be imposed for receipt of information in the absence of a statute or regulation prohibiting dissemination of the information. See App., *infra*, 11a (holding that "the disclosure of the procurement information need not have been proscribed by published [regulation]"). The Second Circuit, in contrast, has held that

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[21] Although the phrase "without authority" modifies only the words "sell[ing], convey[ing] or dispos[ing] of * * * anything of value of the United States," the offense of "conversion" as embodied in the statute is also understood to require proof of the "unauthorized use[ ] of government property." *Morissette* v. *United States*, 342 U.S. at 272.

[22] Indeed, one court has concluded that, in the absence of a more narrow construction such as we propose, "[t]he statutory phrase 'without authority' is virtually devoid of meaning when applied to the transfer of information." *United States* v. *Lambert*, 446 F. Supp. 890, 898 (D. Conn. 1978), aff'd, *United States* v. *Girard*, *supra*, cert. denied, 444 U.S. 871 (1979).

an agency's "rules and regulation forbidding * * * disclosure may be considered as *both a delimitation and a clarification* of the conduct proscribed by [Section 641]." *United States* v. *Girard*, 601 F.2d at 71 (emphasis added).[23] See also *United States* v. *Jeter*, 775 F.2d at 682 ("follow[ing] lead of *Girard*" in upholding Section 641 conviction for conversion of grand jury transcripts, disclosure of which is specifically prohibited by Fed. R. Crim. P. 6(e)).[24] The question whether criminal liability for receipt of information may be imposed in the absence of a statute or regulation prohibiting receipt of such information is a fundamental issue of undeniable significance.[25]

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[23] In *Girard*, the court upheld convictions for unauthorized disclosure of law enforcement information from Drug Enforcement Administration (DEA) files on the ground that dissemination of the information was explicitly prohibited by public regulations. 601 F.2d at 71.

[24] Indeed, prior to this case, the Fourth Circuit itself had upheld criminal liability for dissemination of government information only when disclosure of the information was prohibited by statute or regulation. See *United States* v. *Morison*, 844 F.2d 1057, 1074, 1079 (4th Cir.) (relying on "the classification system" and the public regulations regarding classified information), cert. denied, 488 U.S. 908 (1988); *United States* v. *Fowler*, 932 F.2d 306 (4th Cir. 1991) (upholding prosecution based on dissemination of classified information). See also *United States* v. *Barger*, 931 F.2d 359, 367-369 (6th Cir. 1991) (upholding sufficiency of evidence for Section 641 conviction for conversion of law enforcement information, improper disclosure of which was prohibited by 28 C.F.R. 45.735-10).

[25] Even if the government were correct in its contention that dissemination of *some* of the "procurement sensitive information" was in fact prohibited by regulation (see note 3, *supra*) that would

(continued...)

The rationale for limiting the reach of the statute is obvious: in the absence of such a limiting construction, application of Section 641 to information-gathering would pose an intolerable risk of unfair surprise and government overreaching. As discussed (see pp. 14-15, *supra*), coverage of government information was not contemplated when Section 641 was enacted. Accordingly, the fit, if any, between the language of the statute and information-gathering is extremely loose. Unless Section 641 is tied to specific prohibitions on disclosure, the receipt of government information could be deemed "unauthorized" merely because its disclosure is contrary to official wishes.

Such a reading of the statute clearly invites abuse. Under it, Section 641 could be used "as a vehicle for rendering criminal the reproduction of the most innocuous and the most significant types of governmental documents without reference to whether any such reproduction would be injurious to the national security or to any other legitimate governmental

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[25] (...continued)
in no way affect the "certworthiness" of this case. *First*, the legal theory of the case, embraced by the district court and affirmed by the court of appeals, was that no such prohibition was necessary. *Second*, the government does not deny that dissemination of at least some of the "procurement sensitive information" (including information at the core of the indictment) was prohibited, if at all, only by internal government directives or custom (*e.g.*, Gov't C.A. Br. 17-18 & nn.11-12, 31 n.18). *Third*, knowledge of the lack of authority is an essential element of the offense, and there is no finding here (and little if any evidentiary basis for a finding) that petitioners believed or knew that the disclosures they sought violated federal regulations; indeed, the district court specifically refused to give an instruction that would have required the jury to find such knowledge in order to convict. C.A. App. 167.

interest."[26] Such an interpretation would make it a crime to transfer "not just classified documents, or even documents relating to the national defense, the reproduction of which may be rendered criminal, but any documents which a governmental official may, in his uncontrolled discretion, decide should not be reproduced."[27]

The limitation present in other court of appeals decisions regarding dissemination of government information -- that an independent prohibition be stated in a statute or public regulation -- resolves these problems. By treating Section 641 as a means of enforcing *independent* regulatory or statutory prohibitions on disclosure of information, such as those comprising the classification system or protecting trade secrets in the government's possession, this construction of the statute assures private citizens of fair notice that information-gathering -- an activity that is ordinarily treated as socially desirable -- is in fact unlawful in a particular setting. Insisting on the codification of nondisclosure rules

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[26] Nimmer, 26 Stan. L. Rev. at 322.

[27] *Ibid*. See also *Truong Dinh Hung*, 629 F.2d at 925 (separate opinion of Winter, J.) ("[u]nder § 641 as it is written, no precise standard controls the exercise of discretion by upper level government employees when they decide whether to forbid or permit the disclosure of government information"); *Hubbard*, 474 F. Supp. at 80 ("[i]f a person came across certain completely unclassified information during his employment within the federal government, and discussed it outside the scope of his employment, an argument could be made that he had converted government information in violation of Section 641. Of course, such an interpretation would be impermissible."); Edgar & Schmidt, 21 Harv. C.R.-C.L. L. Rev. at 406 (if construed to punish receipt or transfer of information simply against official wishes, Section 641 "becomes yet another instrument by which the Executive is empowered to pick and choose its targets for suppressing speech").

also constrains the discretion of government officials who might otherwise impede the flow of government information for illegitimate reasons. At the same time, where an official legitimately seeks to police the disclosure of information that *has* been accorded confidential status through the public law-making processes -- such as classified information or law-enforcement data -- this construction permits effective vindication of governmental interests.[28]

Thus, if government information can ever be considered government property for purposes of the general theft and fraud statutes at issue here, it is essential that the government secrecy interest protected by those criminal sanctions be limited to that defined by statute or public regulation.[29]

2. The wire fraud counts in this case were tried and submitted to the jury on essentially the same theory as the theft count: that inducing an official to disclose information that a defendant knows the official is not supposed to disclose constitutes a scheme to defraud the government of property for purposes of Section 1343. See C.A. J.A. 186-187, 195. The question of when a person can fairly and legitimately be held to know that government officials are "without authority" to transfer information for purposes of Section

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[28] Even in the absence of a statute or regulation prohibiting dissemination of government information, moreover, the government may take appropriate employment disciplinary actions against employees who violate internal directives against disclosure; the issue here is solely whether criminal liability may be imposed for theft of government information in the absence of such a statute or regulation prohibiting the dissemination.

[29] Indeed, in the absence of such a saving construction, the pertinent statutes would violate the Due Process Clause because they would fail to give fair notice of prohibited conduct. *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

1343 raises the same concerns as does the question of when a person can fairly and legitimately be held to know that transfer of government information is "without authority" for purposes of Section 641. So too, the question whether the government's interest in secrecy of information is protectible as a property interest -- if defined under Section 641 in terms of creation through public laws or regulations -- is likewise circumscribed for purposes of Section 1343. Consequently, the answer to both questions should be the same: the criminal prohibition arises only when the release of information is clearly proscribed by published regulation or statute.[30]

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[30] In *Carpenter* v. *United States, supra*, this Court upheld mail and wire fraud convictions for disclosure of "confidential business information." As discussed (note 19, *supra*), the presumption whether information is proprietary is entirely different for private entities than it is for the government. In *Carpenter*, moreover, the Court noted that maintaining the confidentiality of the information was "[t]he *official* policy and practice" of the newspaper as reflected by a "declaration to that effect in the employee manual." *Id.* at 23, 28 (emphasis added). Statements of official policy in employment manuals serve the same notification function for employees in the workplace as do public regulations or statutes for private citizens in society at large.

For the same reasons that govern the construction of Sections 641 and 1343, efforts to obtain information from the government, in the absence of a regulation or statute prohibiting dissemination of the information, are not a conspiracy to defraud the United States. And, in any event, if the convictions on the substantive counts are invalid, the conspiracy conviction must be set aside because it is likely to rest on an impermissible basis. See *Yates* v. *United States, supra*.

C. The Issue Is Of Recurring Importance

1. The decision below radically (and dangerously) expands the prosecutor's arsenal. Under it, virtually any leak of government information could be the basis for criminal liability. The tension between this sweeping new theory of information theft and conduct that is pervasive throughout our political and economic life is evidenced by the broad range of groups that participated below as *amici curiae*.[31] Journalists, scholars, and other members of the press routinely seek out unclassified information from government sources, even knowing that its release is contrary to agency "custom and practice."[32] It is also commonplace for private citizens and companies to seek out government information for use in their businesses, so long as disclosure is not prohibited by statute or regulation.[33] A rule of law that may expose so vast a range of conduct to criminal liability clearly warrants this Court's attention and consideration.[34]

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[31] Among the groups submitting *amicus* briefs in support of petitioners were the Washington Post; the American Society of Newspaper Editors; the Newsletter Publishers Association, Inc.; the Radio-Television News Directors Association; the Reporters Committee for Freedom of the Press; the American Civil Liberties Union; the Newspaper Guild; the Electronic Industries Association; and the Washington Legal Foundation.

[32] See Washington Post, *et al.* C.A. Br. 4-6, 16-17.

[33] See Washington Legal Foundation C.A. Br. 11-13; Electronic Industries Association C.A. Br. 2-3.

[34] The court of appeals' decision has only intensified the concerns expressed by amici below. See, *e.g.*, "A Presumption for Public Access," WASHINGTON POST, Oct. 26, 1992, A20 ("[P]rosecutors have acted on, and an appeals court has approved, a sweeping

(continued...)

2. The pertinent regulatory context in this case highlights the importance of the issue and illustrates the unfairness of permitting criminal prosecution under broad interpretations of statutes whose stated or intended domain does not clearly encompass the type of conduct at issue.

The district court's conclusion at sentencing -- that petitioners' efforts to obtain government information occurred "under an unclear regulatory regime that was later clarified" (C.A. App. 63, 65) -- was, if anything, an understatement. Before 1990, the Federal Acquisition Regulations (FARs) authorized "[c]ontracting officers [to] make available maximum information to the public" so long as disclosure did not "provide undue or discriminatory advantage to private or personal interest." 48 C.F.R. § 5.401(b)(1) (1987). The question of when disclosure would be deemed to result in "undue or discriminatory advantage" was not answered anywhere in the federal regulations but rather was committed to "the discretionary authority of the program manager," to be answered on "a case-by-case basis."[35] High-ranking government officers recognized, and approved of, a system in

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[34] (...continued)
theory that criminalizes the receipt of government information that is neither classified nor clearly protected by any other law. If this ruling is allowed to stand, reporters and other private citizens could be sent to jail for receiving tips about government corruption, telephone calls about proposed policy changes that are sure to be controversial, or whistle-blower complaints about government inefficiency or inaction.").

[35] *Oversight of DOD's Management of Inside Information in the Acquisition Process: Hearing Before The Subcomm. on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, 101st Cong., 1st Sess. 41, 42 (Feb. 24, 1989) (testimony of Robert B. Costello, Under Secretary of Defense for Acquisition) [hereinafter *"Oversight Hearing"*].

which, "[a]t the same time that industrial suppliers seek information to better enable themselves to meet the Government's needs, each supplier also seeks information in order to influence those needs and to gain advantage over its competitors."[36]

It was only some time *after* petitioners' conduct that Congress decided to change this regime and, for the first time, specifically make it a crime for any "competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor * * * knowingly * * * [to] solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract, any proprietary or source selection information regarding [a] procurement."[37] Congress fully appreciated just how sharp a break the Procurement Integrity Act was with existing law.[38] Accordingly, Congress initially delayed

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[36] *Id.* at 74 (testimony of Under Secretary of the Navy H. Lawrence Garrett III).

[37] Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6(a), 102 Stat. 4063 ("Procurement Integrity Act"), codified at 41 U.S.C. 423(a)(3) and (j) (Supp. II 1990).

[38] See H.R. Rep. No. 911, 100th Cong., 2d Sess. 20 (1988) (recognizing that prior to Procurement Integrity Act there were "no laws designed specifically to address * * * insider trading of sensitive procurement information"). See also 135 Cong. Rec. S15961 (Nov. 17, 1989) (Sen. Grassley) ("[T]his is the only law * * * on the books that restricts the use of nonclassified procurement information."); *id.* at S15993 (Sen. Glenn) (although other laws prohibit practices identified in "[I]ll [W]ind such as bribery of public officials, there is no law except [P]rocurement [I]ntegrity which establishes civil and criminal penalties for trafficking in unclassified, procurement-sensitive information."); (continued...)

the effective date of the Procurement Integrity Act for six months to permit affected parties to adjust their conduct to the Act's new, criminally enforceable duties. Pub. L. No. 100-679, § 6(b), 102 Stat. 4068. Thereafter, Congress delayed the effective date of the Act for an additional two months in order to allow contractors to become familiar with the new regulations implementing the Act.[39] Then, after only a brief period of effectiveness, the Procurement Integrity Act was suspended for still an additional year before finally becoming effective on December 1, 1990.[40] It is nothing short of bizarre to convert this carefully considered and twice-repeated staying of the legislative hand into a nullity by ruling that the same conduct Congress so carefully studied and legislated

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[38] (...continued)
Oversight Hearing at 62 (Sen. Levin) ("[T]he confusion and uncertainty [over disclosure] * * * has contributed to * * * an atmosphere * * * which is intolerable and which is, frankly, unfair to you folks [the contractors] as well as to the taxpayers. You ought to know which documents can be disclosed and which ones cannot be disclosed.").

[39] See Pub. L. No. 101-28, 103 Stat. 57 (1989). See also 135 Cong. Rec. H1876 (May 15, 1989) (Rep. Conyers) ("[Regulated parties] deserve a fair chance to know the rules of the game especially when a violation of these rules carries with it severe civil penalties and prison terms."); *ibid.* (Rep. Frank) ("[t]he sole purpose here of giving an additional 60 days [is] so that people can become familiar with the regulations"); *ibid.* (Rep. Neilson) (legislation gives regulated party "60 more days to get the provisions of the rules incorporated into the organization"); 135 Cong. Rec. S5162 (May 11, 1989) (Sen. Glenn) ("both industry and government may need a little more time to study the interim regulations in order to adequately implement the law without confusion or inordinate and unreasoned concern").

[40] See Pub. L. No. 101-194 § 507(1), 103 Stat. 1759 (1989).

about was already criminalized by the general theft and fraud statutes on which this prosecution depends.

This context vividly underscores the dangers – and practical importance – of the court of appeals' expansive interpretation. A purported "custom and practice" of non-disclosure is used to establish a prohibition on disseminating information that published statutes and regulations – the ordinary sources for the government's instructions to the citizenry about prohibited conduct – fail to provide. The result is that government policy on secrecy is itself formulated in secret, free from the public inquiry, comment, and debate that accompanies legislation or public rulemaking.

3. The court of appeals' interpretation renders criminal the disclosure or obtaining of government information in a disturbingly wide variety of circumstances in which dissemination of the information is not prohibited by published statute or regulation but merely by internal government policies or practices. This regime represents a sharp departure from the historic approach to government information. That traditional understanding is reflected in Justice Stewart's description of the information-gathering "contest" between the government and the press: although the government may be understood to have internal practices or policies against disclosure of certain types of information, private parties outside the government are equally understood to be free to seek out this information and to use it if they obtain it. See Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 635-636 (1975). If Congress wishes to make simply *engaging* in the contest illegal, it must do so "through carefully drawn legislation." *Id.* at 636.

Petitioners stand convicted of ferreting out government information that was not denied them by specific regulation or statute. Although they are the first individuals whose convictions have been upheld by an appellate court on such a

basis, this new rule of law has the potential to affect, and therefore to chill the activities of, *all* individuals who obtain, or seek to obtain, government information that is subject to nondisclosure only by the government's "custom and practice" and internal policies.

Because of the importance of the issue, and because of the divergence in the lower courts on both of the steps necessary to reach the court of appeals' conclusion, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-5874

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS D. MCAUSLAND,
Defendant-Appellant,

THE WASHINGTON POST; AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE NEWSLETTER PUBLISHERS ASSOCIATION, INCORPORATED; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN CIVIL LIBERTIES UNION; THE NEWSPAPER GUILD; THE ELECTRONIC INDUSTRIES ASSOCIATION; WASHINGTON LEGAL FOUNDATION,
Amici Curiae.

No. 91-5875

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRISTOPHER M. PAFORT,
Defendant-Appellant,

THE WASHINGTON POST; AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE NEWSLETTER PUBLISHERS ASSOCIATION, INCORPORATED; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN CIVIL LIBERTIES UNION; THE NEWSPAPER GUILD; THE ELECTRONIC INDUSTRIES ASSOCIATION; WASHINGTON LEGAL FOUNDATION,
Amici Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, Alexandria Division.

T.S. Ellis, III, District Judge.

(CR-91-101-A)

Argued: May 5, 1992

Decided: August 14, 1992

Before HALL and WILLIAMS, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Thomas D. McAusland ("McAusland") and Christopher M. Pafort ("Pafort") appeal their convictions of one count of conspiracy to defraud the United States and to commit substantive offenses under 18 U.S.C. § 371, one count of conversion or unauthorized conveyance of government property under 18 U.S.C. § 641, and four counts of wire fraud under 18 U.S.C. § 1343. We affirm.

I.

In 1987, McAusland and Pafort were marketing executives employed by Litton Data Systems, Inc. ("Litton"). McAusland was vice-president of marketing or business development, and Pafort was a director of business development. Both McAusland and Pafort's duties included trying to obtain new business for Litton from the United States Department of Defense ("DoD"). In carrying out these duties, McAusland and Pafort had contact with Thomas Muldoon ("Muldoon"), a private consultant hired by Litton to identify new business opportunities and to develop information on ongoing procurements. Between June, 1987 and June, 1988, Litton paid Muldoon $96,000 for his consulting services.

A brief overview of the government's procurement procedure is helpful for a full understanding of the facts of this case. The procurement process is conducted within the framework established by the Federal Acquisition Regulations ("FARs"). The process begins when the government designs a program to meet a national defense need. The contracting

agency then issues a request for proposals ("RFP"). 48 C.F.R. § 15.402 (1991). Once the proposals are submitted, the agency performs its initial evaluation, with the cost and technical components being evaluated separately. These reviews are then combined and evaluated by the contracting officer or by an advisory team. This initial evaluation determines the "competitive range" for the procurement. This range consists of the proposals "that have a reasonable chance of being selected for award." *Id.* § 15.609(a). Proposals which do not fall within this range are no longer considered. Once this initial evaluation is complete, the agency may enter into formal discussions with the remaining competitors. These remaining competitors are then invited to submit their "best and final offers" ("BAFOs"). *Id.* § 15.611. The source selection authority then decides to whom the contract will be awarded based on the recommendations of the contracting officer or advisory team.

This case involves the efforts of McAusland and Pafort to obtain procurement information between March, 1987 and June, 1988.[1] During this time, McAusland and Pafort received information from Muldoon concerning three procurements: (1) the Advanced Tactical Air Command Central ("ATACC"), a procurement for radar command and ground control system conducted by the Space and Naval Warfare Systems Command ("SPAWAR"); (2) UYQ-21, a procurement for a radar display system conducted by Naval Sea Systems Command ("NAVSEA"); and (3) Fiber Optics Cable System ("FOCS"), a procurement conducted by SPAWAR, to obtain a source for a Marine Corps fiber optic communications system.

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[1]The conduct giving rise to the convictions occurred prior to the passage of the Procurement Integrity Act. 41 U.S.C.A. § 423 (West Supp. 1992).

1. ATACC

On April 30, 1987, SPAWAR issued the RFP on ATACC. The RFP stated that any proposals would be evaluated in four areas based on a weighted average. However, the RFP did not list the weights government evaluators would assign to each area.

Pafort was directly responsible for preparing Litton's proposal on ATACC. On July 28, 1987, Pafort spoke to Muldoon about the ATACC procurement and asked Muldoon for any information he could obtain concerning the procurement. Pafort advised Muldoon that Litton's strategy was to submit an initial bid that, while not meant to be the lowest bid, would be low enough to include Litton in the "competitive range."

Ultimately, Muldoon provided McAusland with the evaluation weights that the government would use in judging bids on ATACC. Muldoon obtained this information from Mark Saunders ("Saunders"), another private consultant, who had received the information from George Stone ("Stone"), the SPAWAR official responsible for conducting the ATACC procurement. Muldoon paid Saunders for this information.

On August 17, 1987, McAusland informed Muldoon that Litton was ready to submit its ATACC proposal. They agreed that Muldoon should not attempt to obtain copies of all the competitor's technical proposals. McAusland stated that to do so would be "playing with fire." The two agreed to wait until after the government had examined the initial proposals to determine whether Muldoon needed to obtain a particular competitor's proposal.

Muldoon told Pafort about McAusland's decision not to obtain copies of all the technical proposals. Muldoon stated that he would not obtain a competitor's proposal unless

a proposal contained a design that Litton would want to "steal."

On August 21, 1987, Pafort asked Muldoon how soon he would have the information about the competitors' bids. Later, McAusland told Muldoon that Muldoon could sell the information to another competitor if Litton did not have a chance of getting the contract.

On September 24, 1987, Saunders told Muldoon that he did not expect to obtain any information on ATACC in the near future. However, Saunders stated he might be able to learn where Litton stood in comparison with the other companies. Muldoon then told Pafort that he had asked his source to find out where Litton stood. Muldoon said that if he obtained this information, Pafort should come to Washington rather than discussing it on the telephone. Pafort agreed.

On September 29, Stone told Saunders what each competitor in the ATACC procurement had bid. Stone also told Saunders that Litton's bid had been the highest and was not in the competitive range.

Saunders then told Muldoon that Litton had submitted the highest bid and told Muldoon the price Stone had quoted as being Litton's. Saunders also told Muldoon that Litton would be eliminated before the next stage of the competition.

On October 1,1987, Muldoon gave this information to McAusland. McAusland verified that Muldoon had accurately reported Litton's bid and agreed that Muldoon's other information was probably correct. Muldoon advised McAusland not to send a letter withdrawing Litton's bid because Litton was not supposed to know that it would be eliminated. McAusland agreed.

Between October and March, 1988, SPAWAR continued the evaluation process of the initial ATACC

proposals. During this period, Pafort asked Muldoon for the latest information on ATACC. Pafort said he was interested because Litton had invested $1 million in its ATACC effort. In February, Pafort said he would like to see the ranking of the competitors, which Muldoon indicated he had obtained from his source. Muldoon had obtained them from Saunders who had, in turn, obtained them from Stone.

SPAWAR officials concluded their evaluation process in February, 1988. In March, 1988, they notified four companies that they were in the competitive range and would continue in the competition, while advising Litton and others that they were being eliminated. The contract was ultimately awarded to Grumman Systems for approximately $95 million.

2. UYQ-21

In June, 1987, Litton, Raytheon and SAIC submitted bids to NAVSEA for the UYQ-21 contract. On August 19 and 20, 1987, government officials gave final approval to the evaluators' recommendation to award the contract to Raytheon without requesting any BAFOs. Prior to these final approvals, McAusland and Pafort spoke to Muldoon about the procurement on several occasions.

Muldoon knew Jerry Manning ("Manning"), who was on the government cost review team evaluating the proposals. Muldoon told Manning that Litton had obtained copies of all the competitors' proposals. Muldoon showed Manning a list of dollar amounts, which Manning confirmed as being the figures from each of the UYQ-21 price proposals. On July 29, 1987, Manning also told Muldoon that Litton would have to revise its cost proposal if the company was going to win the contract at the BAFO stage.

On July 29, 1987, Muldoon told McAusland that Muldoon had copies of the government's evaluations of the UYQ-21 price proposals. McAusland telephoned George

Miller, another Litton executive, and told Miller he would bring the pricing evaluations to Litton's offices.

On July 31, 1987, Muldoon advised McAusland that Muldoon had left a document at Litton's Virginia office that "looked good." McAusland said that he had instructed a secretary to send the document to him via express mail. Muldoon also referred to information contained in the document, which corresponded to information contained in the government's Source Selection Plan for the UYQ-21 procurement. Manning had given this document to Muldoon.

In August, 1987, Muldoon told McAusland and Pafort that the Navy would probably award the contract without requesting BAFOs. Muldoon told Pafort and McAusland that, after the initial evaluations, Litton was second behind Raytheon in the bidding. Muldoon learned this from Manning.

In July and August, 1987, Muldoon also told McAusland that Muldoon had a contact, identified as a government official, who could ensure a request for BAFOs on the UYQ-21 if Litton came up with some money. McAusland asked if Litton could win the contract if the Navy asked for BAFOs. Muldoon advised McAusland that Raytheon had ranked substantially better in the initial evaluation. McAusland asked if Muldoon could obtain the technical evaluations before Litton would have to submit its BAFO. Muldoon did not think that he could. McAusland then indicated that he did not want to pursue this course of action. The Navy awarded the contract to Raytheon for approximately $47 million.

3. FOCS

In December, 1987, Muldoon provided McAusland with a copy of the draft of the government's Acquisition Plan for the procurement. In early 1988, Pafort told Muldoon that Litton was interested in the program and asked Muldoon to check on the proposed date the government was going to issue a RFP on the project. Subsequently, when the RFP was released, Litton did not submit an offer on the FOCS plan.

Defendants also challenge the trial court's denial of their motion for a mistrial. On June 14, 1991, while Defendants' trial was in progress, the government issued a press release concerning the guilty plea of former Assistant Secretary of the Navy, Melvin Paisley ("Paisley"). Paisley pled guilty as a result of a fraud investigation known as "Operation Ill Wind" which involved bid rigging and government contracts. News stories concerning the plea appeared on that evening's television news and in the newspaper the following day. Defendants moved for a mistrial based on the publicity. The district court questioned the jury concerning the Paisley plea. Although members of the jury had seen the television news and newspaper article, each juror stated he or she could render an impartial decision. The district court then permitted the trial to continue.

II.

Section 641 punishes an individual who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or *without authority*, sells, conveys or disposes of any record, voucher, money or thing of value[2] of the United States ...." 18 U.S.C. § 641 (emphasis added). Defendants

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[2]This circuit has recognized that information, such as that involved in this case, is a "thing of value" under section 641. *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991).

contend that, standing alone, the phrase "without authority" is devoid of meaning and that it must derive its meaning from "other, more particular, prohibitions against disclosure" established by "federal statutes [or] administrative rules and regulations." *United States v. Lambert*, 446 F.Supp. 890, 899 (D. Conn. 1978), *aff'd sub nom. United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

Specifically, Defendants contend that they can be convicted of information theft under section 641 only if disclosure of the information was clearly prohibited by published FARs. Defendants assert that, without specific FARs prohibiting disclosure, section 641 violates the Due Process Clause as applied to the conduct at issue because the statute is unconstitutionally vague. Defendants assert that this same argument prohibits their convictions under sections 371 and 1343. We disagree.

Defendants cite two primary cases for the proposition that they can be convicted under section 641 only if disclosure of the information was prohibited by specific published regulations: *United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979), and *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988). Labelling their argument as the *"Girard - Morison"* rule, Defendants assert that the case was prosecuted under a legally defective theory.

In *Girard*, defendants were convicted under section 641 of selling the names of Drug Enforcement Agency ("DEA") informants obtained from the DEA's computerized files. Defendants challenged their convictions on the ground that section 641 was vague and overbroad. *Girard*, 601 F.2d at 71. The court concluded that the defendants must have known that the sale of this information was prohibited. The court noted that the DEA's own rules and regulations forbid such disclosure. The court stated that these rules "*may* be

considered as both a delimitation and a clarification of the conduct proscribed" under section 641. *Id.* (emphasis added). Therefore, the court concluded that section 641 was not vague or overbroad as applied to the defendants. *Id.* at 71-72.

In *Morison*, defendant was convicted under the Espionage Act, 18 U.S.C. § 793(d) and (e), for the unauthorized transmittal of certain satellite secured photographs of Soviet naval preparation to "one not entitled to receive them."[3] Defendant challenged his conviction under 18 U.S.C. § 793(d) and (e) on the grounds that the statute was vague and overbroad. However, the court found that the defendant was familiar with the regulations governing disclosure of the information. The court followed *Girard* and stated that the statutes "*can* be limited and clarified by the Classification Regulations and, so limited and clarified, are not vague." *Morison*, 844 F.2d at 1075 (emphasis added).

We do not read these decisions as requiring the disclosure to be specifically proscribed by published regulations. While we agree that the existence of a published regulation proscribing disclosure certainly prevents the statute from being vague as applied, we do not believe it is the exclusive method of preventing vagueness. *See United States v. Jones*, 677 F. Supp. 238, 241 (S.D.N.Y. 1988) (knowledge of lack of authority shown through defendant's knowledge of the "government's longstanding practice" of confidentiality). Thus, we hold that the disclosure of the procurement information need not have been proscribed by published FARs in order to prevent section 641 from being vague as applied.

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[3]Defendant was also convicted under section 641. However, the court did not address whether this section was vague as applied to the defendant.

Defendants concede that, if the Court rejects the *Girard - Morison* rule, their remaining arguments on this issue will similarly fall. We agree and address their remaining points briefly.

Defendants assert that rejection of the *Girard - Morison* theory renders section 641 vague as applied to the conduct at issue. The Due Process Clause requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and provide "explicit standards for those that apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Here, Defendants assert that section 641 is vague as applied rather than vague on its face. Such a challenge "must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

The government has cited several categories of evidence to show that disclosure was without authority and that Defendants knew as much. The government cites published regulations which were in effect at the time of the relevant conduct and prohibited disclosure of information in the proposals. 48 C.F.R. §§ 15.413-1(a), 15.610(d), 15.612(e) (1987). The government also cites unpublished DoD regulations, which are available through the Freedom of Information Act, that forbid disclosure. DoD Directive 4105.62(E)(3)(c).[4] Many of the documents obtained by

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[4]This provides:

> To ensure fairness in the source selection process, evaluation criteria and their relative importance must flow from the statement of work and must be furnished to all potential offerors in the solicitation. The relative importance of the evaluation criteria will be indicated in the solicitation. However, when numerical weights are

Litton contained legends restricting disclosure, which a panel of this Court recently found relevant in considering whether an individual had fair notice that his conduct was proscribed by law. *United States v. Caso*, No. 90-5830 (4th Cir. June 14, 1991) (unpublished). Defendants' behavior and conduct also indicated that they knew the disclosure was without authority. For example, McAusland agreed that he should not write a letter withdrawing Litton's ATACC bid because he was not supposed to know where Litton stood in the competition. He also agreed that having Muldoon get all of the ATACC competitors bids would be "playing with fire." Pafort agreed to travel to meet Muldoon in order to avoid discussing certain information over the phone. At trial, Pafort testified that he would not ask for rankings and technical evaluations of competitors because that "was not the correct thing to do." This is a relevant consideration. *Id.* Stone and Manning testified to their lack of authority to disclosure the information. Other procurement officials testified that Defendants, in light of their experience and positions, would have known that the information was not to be disclosed.[5]

In light of the above, we hold that the statute was not unconstitutionally vague as applied to Defendants' behavior. Also, we hold that "in view of the statute's plainly legitimate sweep in regulating conduct, it is not so substantially overbroad that any overbreadth that may exist cannot be

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> applied by the SSA or SSAC [(Source Selection Advisory Counsel)], such weights will not be disclosed either to offerors or to evaluators other than the SSAC, to preclude intentional or unintentional bias in proposals or evaluations.

[5]This testimony was proper as held by this court in *Fowler*, 932 F.2d at 312.

cured on a case by case basis." *Girard*, 601 F.2d at 72; *see also United States v. Jeter*, 775 F.2d 670, 682 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986) (rejecting claim that section 641 was overbroad).

Defendants also challenge the district court's jury instructions. Defendants claim the trial court erred in refusing to give an instruction: (1) requiring the jury to find that Defendants "knew that the information ... was released without authority in violation of [federal acquisition] regulations" (App. at 167); and (2) concerning Defendants' receipt of the determination that Litton's ATACC proposal was unacceptable (App. at 168). When considering a challenge to jury instructions, the inquiry on appeal is limited to "whether, taken as a whole, the instruction fairly states the controlling law." *United States v. Cobb*, 905 F.2d 784, 789 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 758 (1991). The validity of both these instructions hinges on the Court's acceptance of the "*Girard - Morison*" rule. Since we have declined to accept this rule, these arguments must similarly fall.

III.

Defendants assert that the district court erred in denying their motions for mistrial based on the publicity surrounding the Paisley plea. The threshold question in addressing a claim of in-trial publicity "is whether the publicity rises to the level of substantial prejudicial material." *United States v. Jones*, 542 F.2d 186, 194 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976). If the publicity rises to this level, the court must "ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial." *United States v. Hankish*, 502 F.2d 71, 77 (4th Cir. 1974). If the publicity does not reach this level, the court need not take the

precautions mandated by *Hankish*, including granting a mistrial. *Jones*, 542 F.2d at 194.

Here, the publicity was not substantially prejudicial. "Information is prejudicial if it is substantially adverse to the defendant, has not been presented to the trial jury in court and is not properly admissible in the trial." *United States v. Gray*, 788 F.2d 1031, 1033 (4th Cir. 1986). Defendants have failed to meet this standard. Paisley was not a co-defendant, nor was he involved in any of the acts charged against Defendants. Therefore, the court did not err in denying the mistrial.

IV.

Defendants assert that the district court erred in denying their motion *in limine* to exclude evidence of the guilty pleas and plea agreements of the two procurement officials who disclosed the information specified in the indictment from the prosecution's case-in-chief. However, we find that this issue is controlled by *United States v. Henderson*, 717 F.2d 135, 137 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984) and affirm the district court's decision.

V.

For the foregoing reasons, we find that the district court committed no error. We therefore affirm.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 91-5874, 91-5874

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS D. McAUSLAND and
CHRISTOPHER M. PAFORT,
Defendants-Appellants

ORDER

[Filed October 1, 1992]

This case is before the court on the petition for rehearing; the court, having considered briefs in support of rehearing and in opposition, it is **ADJUDGED** and **ORDERED** that the petition for rehearing is **DENIED** and no member of the panel requesting a poll of the court on the suggestion for rehearing *en banc*.

Upon further consideration, it is hereby **ADJUDGED** and **ORDERED** that the Clerk shall change this opinion from UNPUBLISHED to PUBLISHED, with the following corrections:

On page 1, delete "affirmed by unpublished per curiam opinion" and in lieu thereof, insert "affirmed by published opinion, Judge Glen M. Williams wrote the opinion of the court in which Judges Hall and Karen Williams concurred."

On page 2, delete the phrase stating "unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6;" also delete the words "per curiam" and insert in lieu thereof "opinion by Glen M. Williams, Senior United States District Judge."

The Clerk shall furnish copies of this Order to counsel and to all active judges of this circuit.

ENTER: This 28th day of September 1992.

/s/ Glen M. Williams
Senior United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 91-5874(L)
(CR-91-101-A)

United States of America,
Plaintiff-Appellee,

v.

Thomas D. McAusland, Et Al,
Defendants-Appellants.

ORDER

[Filed October 27, 1992]

The Court amends its opinion filed August 14, 1992, as follows:

On the cover sheet, section 1 -- the status is changed from "unpublished" to *published."*

On page 2, section 5 -- the status is changed to read "Affirmed by *published opinion. Senior Judge Williams wrote the opinion, in which Judge Hall and Judge Williams joined."*

On page 3 -- the section dealing with use of unpublished opinions as precedent is deleted.

On page 3, line 1 of the opinion -- "per curiam" is corrected to read *"WILLIAMS, Senior District Judge."*

On page 13, third full paragraph, line 7 -- a comma is added after "(1984)."

For the Court - By Direction

/s/ Bert M. Montague
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

(CR 91-101-A)

UNITED STATES OF AMERICA

v.

THOMAS D. McAUSLAND and
CHRISTOPHER M. PAFORT, Defendants.

District Court Decision Denying
Motion to Dismiss Indictment
(May 9, 1991)

[EXCERPTS OF PROCEEDINGS]*

THE COURT: Under 641, I think there is no longer any question, given the Fourth Circuit's opinion in this circuit, that information is a species of property and a thing of value under 641. And 641 -- that's, of course, the Fourth Circuit said that in the [*Fowler*] opinion, which came down only a week or so ago.

* * *

The motion to dimiss the indictment based on the vagueness/overbreadth, as applied -- or even on its face, or as applied -- the Fifth Amendment and First Amendment arguments are really a step beyond the Ill Wind cases that

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*The reprinted excerpts are from the May 9, 1991 transcript of proceedings at p. 7 and pp. 50-52.

have been tried so far because, as the Court reads it, 641 has not been applied in this context.

The arguments were interesting. And it's important for the Court to decide this issue first because a granting of this motion ends the prosecution. Accordingly, the Court took this matter up first. At least it ends this part of it.

And the Court concludes, after review of the record and the arguments, that the motion to dismiss the indictment must be denied. The Court focused chiefly on the language "without authority." And it really is a jury issue on whether the disclosure was without authorization and whether defendants knew that.

The Court doesn't -- it concludes there's really no First Amendment problem on the indictment. There might be on other facts in this context, but not on the indictment as it's pled.

As far as the Fifth Amendment and the intersection of the First and Fifth Amendment, the defendants argue that that's really all that Judge Winter was saying: is that when there is this intersection and in this context where government information is involved under 641, that caution has to be exercised.

I think that probably is a reasonable reading of the Winter opinion. And that certainly is a -- that caution certainly survives.

What is clear now after the Fourth Circuit's recent decision in *Fowler* is that the theft of government information is clearly covered under 641.

The Court doesn't really reach the issue whether you don't have to have any custom or any rule or any regulation because, indeed, the government has and has cited specific regulations, instructions, and intends to show custom and

practice and acknowledges that it must show that the defendants knew that the disclosure was without authorization in order to make out the 641 violation.

And the Court concludes that it simply isn't -- the detailed indictment taken together with the language of 641 is not constitutionally infirm and, therefore, denies the motion and declines the invitation for a supplemental evidentiary hearing.

APPENDIX E

THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

(CRIMINAL NO. 91-101-A)

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THOMAS D. McAUSLAND, and,
CHRISTOPHER M. PAFORT, Defendants.

Alexandria, Virginia
August 23, 1991

[EXCERPT OF PROCEEDINGS]

* * * * * *

THE COURT: It is painfully obvious, I'm sure, to counsel in the case that the Court finds this a troublesome area. It's a troublesome area because it's a novel area. No case is directly in point. No case is itself entirely nourishing. And the Court is not going to go through a lengthy recitation of it, but, in essence, the Court concludes ultimately that the motion for judgment of acquittal and new trial must be denied.

It's a very close question in the Court's mind on the due process issue. The Court concludes that there was evidence from which a jury could find beyond a reasonable doubt, as I've ruled on the motion for judgment of acquittal, each and every elements of the offenses charged.

I'll summarize briefly that the defendants sought procurement sensitive information that they -- it was not

authorized and that they knew was not authorized to be disclosed. There was evidence from which the jury could find that they sought and received procurement sensitive information from Mr. Muldoon, and that procurement sensitive information was not authorized to be released. There was also evidence from which the jury could find that the defendants knew it was not authorized to be released.

The due process point ultimately the Court resolves against the defendants here with a fair warning. I think the argument was very well made by the defendants, and it will not surprise the Court if that argument ultimately is vindicated on appeal.

APPENDIX F

18 U.S.C. § 371 provides:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the Untied States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 641 provides:

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted --

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined

not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.